

Kitty are now back home in central Florida, and Sandy and I wish them both the very best.

Ms. MURKOWSKI. Mr. President, I rise to remember a good friend who is leaving the Senate after a career of public service, Senator Mel Martinez.

Mel Martinez came to the Senate in 2005 after serving as Secretary of Housing and Urban Development under President George W. Bush. Senator Martinez was the first Cuban American to serve in the U.S. Senate. Born in Cuba, Senator Martinez arrived in the United States at age 15.

During his tenure as Secretary of Housing and Urban Development, Mel Martinez addressed the National Congress of American Indians, pledging to strengthen the government to government relationship with tribes in the Federal Indian programs administered by his agency. He was keenly interested in ameliorating the third world housing conditions that exist in the Native villages of rural Alaska. Alaska's tribe and tribal housing authorities benefit greatly from Federal funding available under the Native American Housing Assistance and Self Determination Act and other Federal housing programs, which were strengthened under Senator Martinez' leadership at HUD.

Despite the fact that the States we represent are as far away geographically as States can be, we have always been good friends.

I was proud to serve with Senator Martinez on the Energy and Natural Resources Committee. Senator Martinez was a close ally on energy issues, and he was always a fierce advocate for the interests of his Floridian constituents. We shared a common interest in promoting Federal energy efficiency standards, responsible nuclear waste storage, and we worked together on the 2005 Energy Policy Act. He was a tough bargainer on the more recent 2007 Energy Independence and Security Act as he aggressively pursued the interests of his constituents with respect to Federal Outer Continental Shelf energy development.

I wish Mel Martinez and his wife Kitty the best of luck in their future endeavors.

MILITARY NOMINATIONS

Mr. LEVIN. Mr. President, from the Committee on Armed Services, I report favorably the attached listing of nominations:

Those identified with a single bullet • are to be placed on the Executive Calendar. Those identified with a double asterisk (**) are to lie on the Secretary's desk for the information of any Senator since these names have already appeared in the CONGRESSIONAL RECORD and to save the expense of printing again:

MILITARY NOMINATIONS PENDING WITH THE SENATE ARMED SERVICES COMMITTEE WHICH ARE PROPOSED FOR THE COMMITTEE'S CONSIDERATION ON OCTOBER 8, 2009

• LTG David M. Rodriguez, USA to be lieutenant general and Commander, International Security Assistance Force Joint Command (Reference No. 1067)

ENERGY AND WATER APPROPRIATIONS REQUEST

Mr. BOND. Mr. President, it has come to my attention that my name was incorrectly added next to the line item "St. John's Bayou and New Madrid Floodway" Project in the conference Report of the fiscal year 2010 Energy and Water Resources Development Appropriations Act. I ask that the RECORD reflect that this is a mistake. I did not make a request for funding for this project and my name should not be attached to this project.

PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

Mr. HARKIN. Mr. President, on Tuesday, October 6, I introduced S. 1756, the Protecting Older Workers Against Discrimination Act.

To appreciate the need for this bill, consider the case of a hard-working Iowan named Jack Gross. Mr. Gross gave the prime of his life, a quarter century of loyal service, to one company. How did that company reward him for his dedication and hard work? It brazenly demoted him and other employees over the age of 50, and gave their jobs to a younger employee.

Expressly to prevent this kind of discrimination, over 40 years ago Congress passed the Age Discrimination in Employment Act, ADEA. The ADEA, which made it unlawful to discriminate on the basis of age, was modeled on and used the same language as title VII of the Civil Rights Act of 1964, the law that prohibits employment discrimination on the basis of race, sex, national origin and religion.

When Mr. Gross sought to enforce his rights, a jury of Iowans heard the facts and found that his employer discriminated against him because of age. That jury awarded him almost \$47,000 in lost compensation.

The case was ultimately appealed to the Supreme Court. This past June, in *Gross v. FBL Financial, Inc.*, five Justices rewrote the rules—indeed, effectively rewrote the law—and ruled against Mr. Gross and other older workers. In doing so, the Court made it harder for those with legitimate age discrimination claims to prevail under the ADEA.

For decades, the law was clear. In 1989, in *Price Waterhouse v. Hopkins*, the Court ruled that if a plaintiff seeking relief under title VII of the Civil Rights Act demonstrated that discrimination was a "motivating" or "substantial" factor behind the employer's action, the burden shifted to the employer to show it would have taken the same action regardless of the plaintiff's membership in a protecting class. As part of the Civil Rights Act of 1991, Congress formally codified the "motivating factor" standard with respect to title VII.

Because the Age Discrimination in Employment Act uses the same language as title VII, was modeled off it, and had been interpreted consistent with the Civil Rights Act of 1964, courts correctly and consistently held

that a victim bringing suit under the ADEA need only show that membership in a protected class was a "motivating factor" in an employer's action—the same standard for plaintiffs claiming discrimination on the basis of race, sex, religion, or national origin. If an employee showed that age was one factor in an employment decision, the burden was on the employer to show it had acted for a legitimate reason other than age.

In *Gross*, the Court—addressing a question on which it did not grant certiorari—tore up this settled decades old standard. In its place, the Court applied an entirely new standard that makes it prohibitively difficult for a victim to prove age discrimination. According to the Court, a victim of age discrimination bears the full burden of proving that age was not only a motivating factor but the decisive factor.

This extremely high burden radically undermines older workers' ability to hold employers accountable. Bear in mind that unlawful discrimination is often difficult to detect. Obviously, those who discriminate do not often admit they are acting for discriminatory reasons. To the contrary, they go out of their way to conceal their true intent. Discrimination cases rarely involve a smoking gun.

The reality, however, is that while employers rarely post signs saying "older workers need not apply," ageism in the workforce does indeed exist, as Mr. Gross and his colleagues learned the hard way. Indeed, according to an AARP study, 60 percent of older workers have reported that they or someone they know has faced age discrimination in the workplace.

Countless thousands of American workers who are not yet ready to voluntarily retire find themselves jobless or passed over for promotions because of age discrimination. Older workers often face ugly, baseless stereotypes: That they are not as productive as younger workers; that they cannot learn new skills; that they somehow have a lesser need for income to provide for their families.

These stereotypes—and the discrimination they feed—are wrong and immoral. This is also harmful to our economy, inasmuch as it deprives us of the skills and talents of millions of older workers.

The timing of the Court's decision is particularly troubling. As our economy continues to struggle, older workers are being hit particularly hard. According to the Department of Labor, there are 2 million unemployed workers over the age of 55. This is an all-time high since the Bureau of Labor Statistics began matching age and unemployment in 1948. According to the Equal Employment Opportunity Commission, in 2008 nearly 25,000 age discrimination claims were filed, a 30-percent increase over 2007. Given the stereotypes that older workers face, it is no surprise that, on average they remain unemployed twice as long as all unemployed workers.

The Protecting Older Workers Against Discrimination Act reverses

the Court's decision and restores the law to what it was for decades. The bill makes clear that when an employee shows that discrimination was a "motivating factor" behind a decision, the burden is properly on the employer to show it complied with the law.

The act is modeled on part of the Civil Rights Act of 1991, which passed the Senate 93-5. As under title VII of the Civil Rights Act, once a plaintiff establishes that age was a motivating factor, the burden shifts to the employer. If the employer establishes that the same decision would have been made regardless of discrimination, the employer remains liable, but remedies are limited.

Only the employer is in a position to know his or her own mind and offer an explanation as to why a decision that involves discrimination was actually motivated by legitimate reasons. By putting the entire burden on the worker to demonstrate the absence or insignificance of other factors, the Court in effect gave employers license to discriminate, so long as they do not actually say they are singling out an employee solely because of age.

Finally, the Protecting Older Workers Against Discrimination Act makes clear that the "motivating factor" framework applies to all antidiscrimination and antiretaliation laws.

In Gross, Justice Thomas defended the Court's radical departure from well-established law by noting that the Court "cannot ignore Congress' decision to amend title VII's relevant provisions but not make similar changes to the ADEA." In other words, the Court found that because Congress, in the Civil Rights Act, codified the "motivating factor" framework for title VII of the Civil Rights Act, but not for the ADEA, Congress somehow must have intended Price Waterhouse not to apply to any statute but title VII. This is a serious misreading of the intent of Congress.

Unfortunately, this reasoning in Gross has already had reverberations in other civil rights cases since many antidiscrimination and antiretaliation statutes utilize similar language as title VII and the ADEA. As the Seventh Circuit recently held, "[Gross] holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."

The Protecting Older Workers Against Discrimination Act, therefore makes clear that Congress is in no way questioning the "motivating factor" framework in other antidiscrimination and antiretaliation statutes.

The aim of this bill is very simple. It reiterates what Congress said 40 years ago when it passed the ADEA: When an employer makes an employment decision it is illegal for age to be a factor. A person should not be judged arbitrarily because he or she was born on or before a certain year, despite the fact that he or she still has the ability

to contribute as much, or more, as the next person. This bill will help ensure that all our citizens have an opportunity commensurate with their abilities, for productive employment.

AMERICA'S ECONOMIC STATE OF MIND

Mr. BARRASSO. Mr. President, I rise today to submit for the RECORD a letter I received from the mayor of Evanston, WY, William Davis.

Evanston is a wonderful community located in the Bear River Valley of southwest Wyoming. The town was founded in the 1800's during construction of the First Transcontinental Railroad. Today, over 11,000 people call Evanston home.

Mayor Davis wrote to me last week. He wanted me to know that individuals and communities across Wyoming are feeling the impact of America's current economic times. This does not come as a surprise. What I found of particular interest in Mayor Davis' letter was his observations regarding the primary factor driving our economy: Americans' anxiety about the future.

Like Mayor Davis, I hear regularly from the people of Wyoming who are concerned about the future of our country. They are anxious about the changes being proposed in Washington. They are concerned about losing control over their own lives to Federal bureaucracies. They are angry about the financial train wreck called the Federal deficit that is picking up steam and headed their way.

Mr. President, the mayor's sentiments are shared by thousands of people across Wyoming. I would ask that his letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CITY OF EVANSTON, WYOMING,
September 28, 2009.

Senator MIKE ENZI,
Russell Senate Office Building,
Washington, DC.
Senator JOHN BARRASSO,
Dirksen Senate Office Building,
Washington, DC.
Representative CYNTHIA LUMMIS,
Longworth House Office Building,
Washington, DC.

DEAR SIRS AND MADAM, you have already heard that sales tax revenues in Wyoming have been plunging for quite some time as the economic times continue to challenge the people who live and work here. I am also confident that you are all well aware of the impact that these lost taxes have on local governments in the state— Uinta County's sales taxes for this fiscal year are down nearly 35% from this same time last year. Evanston's last distribution from the Department of Revenue was 48% less than for this same month last year!

It goes without saying that we are spending many hours looking into our budgets for ways to provide city services to our residents and citizens while facing head on the loss of such important revenues. We will survive but it will be painful to say the least.

This brings me to the reason for this letter. I have been giving much thought and consideration to the reasons that people are

not spending their money on those items that generate sales taxes that the local governments depend so heavily upon. Without trying to pick a fight I think that Congress shares much of the burden for the fears and feelings that are keeping citizens and businesses from spending money.

Every day we hear the news of a new \$800 billion program here or a \$1 trillion overhaul of the healthcare system. Seniors hear about a potential loss of Medicare benefits that will cost them more out of pocket for many of their daily needs. Young families see the prices of groceries and utilities on the rise. It is harder for them to afford the basic needs of their children when it comes to school supplies and new clothes. They hear that energy costs to heat their homes and drive their cars are going to go up because of a new cap and trade bill already passed by the House and awaiting action in the Senate. Businesses are stagnant as well while their owners and managers wait to see just what the federal government is going to change that will affect the way they do business. What costs will increase? Will I have to pay even more out from my shrinking bottom line to cover increased costs of unemployment? Healthcare? Utilities? With shrinking sales can I even afford to keep my current employees let alone hire anyone additional? The list just seems to go on and on.

Why would a business seek to expand or hire someone else until these issues are all ironed out? Why would a mother and father plan a vacation or purchase almost anything that is not a necessity when there is so much that is unknown about their future? Will there be an income? Will I have any benefits? Will the prices continue to rise? How can I save for my kids education expenses? What will my taxes be in the future? How much higher can my credit card interest rate go?

These are the questions in the real world that I live in everyday. I don't have to travel back to Wyoming to get this perspective. I hear about it everyday when I go the store or out to dinner. People share their fears and anxieties with me almost everywhere I go these days. Try as I might to offer some assurances that we can work together to make things better my efforts are not very successful.

My quick solution to these problems? Tell Congress to back off for awhile. Certainly there are many problems that need to be addressed on the national level. We all want to have a clean and healthy environment but we all want to have a job as well. All of us would like to see roads and bridges improved and made safer but we also need food to eat and clothes to wear. No one wants to see someone suffer because they don't have adequate health insurance but no one wants to lose that benefit themselves because their employer just laid people off or, worse yet, just closed the doors. In most communities people are used to rallying and supporting their neighbors when they face a sudden illness or get a terminal diagnosis, but if they can't pay the rent they can't do much for their neighbor either.

They read that the national debt ceiling just had to be raised but only by a couple of trillion dollars, so not that much more. The people that talk to me aren't stupid. They know the day of reckoning for all of this spending is coming. They are trying their best to be ready for it but they also know that they won't be able to save enough today to be ready for that tomorrow. They see the treasury print more money or sell more of our debt to a foreign nation and they know that this is not good. They used to be able to get some money to cover their debts from their house but this has gone away. They used to have some retirement funds in the market but this has gone away. They used to